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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
THOMAS L. JOHNSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition, Burlington Northern Railroad ("BN") showed that a perceived inconsistency in this Court's decisions has led the court below and many other state courts to uphold venue provisions that expressly discriminate against non-resident defendants.[1] Because resident corporations are not subject to these provisions, state legislatures feel free to create venue rules that authorize rampant forum shopping against non-resident interstate businesses. Such forum shopping contributes to the explosion in the frequency and cost of personal injury liti-

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[1] The decision below, App. 1a, has recently been reported. 819 P.2d 169 (Mont. 1991).

gation around the country, as demonstrated by petitioner's extensive Montana experience.

The Opposition does not dispel the confusion, diminish the problem, or contest the basic constitutional issue. Rather, the response highlights the reasons why review by this Court is necessary. Respondents never attempt to harmonize this Court's decisions, suggesting instead that this Court's central decision on the issue has been overruled *sub silentio*. *See* Opp. at 5-6.[2] Nor do respondents deny that there is a "lack of agreement between state supreme courts as to whether discrimination in state court venue against out-of-state corporations violates the Equal Protection Clause." Opp. at 3. Respondents do not even attempt to defend the constitutionality of the statute at issue here:

> It is questionable whether or not MCA § 25-2-118 could pass constitutional muster for the manner in which it distinguishes between residents and nonresidents in an ordinary transitory action.

Opp. at 2.

Yet, despite all of these concessions, respondents praise the Montana statute—precisely because it permits unfettered forum shopping. The egregious nature of the constitutional violation here, which petitioner has admittedly been unable to remedy within the state court system and which has broad implications for a host of other state courts, demands intervention by this Court.

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1. Respondents characterize this petition for certiorari as a continuation of BN's "tireless efforts," including six Montana Supreme Court cases, "to deprive injured

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[2] Respondents argue that *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), has been overruled implicitly by later decisions of this Court, including *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976). *See* Opp. at 5. This argument is simply incorrect: *Saunders* was not overruled by *Starnes*, and has since been cited by this Court as good law. *See* Pet. at 9-11. Nor is *Saunders* distinguishable from this case. *See id.* at 10 n.13.

railroaders of their liberal rights of forum selection . . . ." Opp. at 2. In fact, *BN has repeatedly and unsuccessfully sought relief within the Montana court system* from the effects of the venue discrimination to which it has been subjected for decades.[3] Even in this case, BN invited the Montana Supreme Court to construe the state venue law in a manner that would have accorded equal treatment to out-of-state corporations, but that effort was rebuffed.[4] If anything, the long history of litigation over this issue shows that the present constitutional challenge is one of last resort. A refusal to review this case would signal to both the Montana courts and the courts of other states that out-of-state corporations may be subjected to forum shopping with impunity.

2. Under the applicable Montana venue statute, Mont. Code Ann. § 25-2-118 (1989), App. 26a, a domestic corporation may only be sued in its county of residence, whereas an out-of-state corporation may be sued anywhere in the state. Thus, non-resident corporations are expressly denied equal protection from statewide forum shopping by plaintiffs. The disparity in treatment exists regardless of the type of business in which the non-resident corporation engages, or the type of legal action involved.

Nevertheless, respondents argue that the discrimination here is permissible because the underlying cases happen to have been brought under the Federal Employers' Lia-

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[3] *See State ex rel. Burlington Northern R.R. v. District Court of the Eighth Judicial Dist.*, No. 90-233 (Mont. June 28, 1990); *Haug v. Burlington Northern R.R.*, 236 Mont. 368, 770 P.2d 517 (1989); *State ex rel. Burlington Northern R.R. v. District Court of the Eighth Judicial Dist.*, 229 Mont. 325, 746 P.2d 1077 (1987); *Bevacqua v. Burlington Northern, Inc.*, 183 Mont. 237, 598 P.2d 1124 (1979); *Labella v. Burlington Northern R.R.*, 182 Mont. 202, 595 P.2d 1184 (1979); *State ex rel. Great Northern Ry. v. District Court of the Second Judicial Dist.*, 139 Mont. 453, 365 P.2d 512 (1961); *Bracy v. Great Northern Ry.*, 136 Mont. 65, 343 P.2d 848 (1959), *cert. denied*, 361 U.S. 949 (1960).

[4] *See* App. 5a-6a.

bility Act, 45 U.S.C. §§ 1-60 (1981) ("FELA").[5] In its rawest form, the argument seems to be that the "liberal pro-worker policies of the FELA" justify the unequal treatment of out-of-state railroad defendants in state court. *See* Opp. at 10. This is an enormous *non sequitur*, without support either in constitutional principle or the FELA. Respondents fail to explain how a state law may find its own "rational basis" in a federal statute enacted nearly a half century later.[6] The Montana venue distinction is not limited to FELA cases, and applies in many other contexts. *See* Pet. at 12 & n.15. In any event, the FELA provides absolutely no support for discrimination in state court venue between in-state and out-of-state railroads. *See* Pet. at 12 & n.16.[7] Federal law supplies no reason why BN should be subjected to wide-open forum shopping within the state's court system, while venue in FELA and other suits against Montana-based railroads is far more restricted.

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[5] The pertinent portion of the decision below is found at App. 9a-11a. Contrary to respondents' assertion, Opp. at 3, the Montana Supreme Court never ventured a rational basis for the disparate treatment worked by the Montana statute at issue. The pertinent portion of the decision below began with the preface, "[*w*]*ithout addressing the greater issue of whether there is a rational basis for treating all out-of-state corporations differently from all domestic corporations . . .*," and then went on to discuss reasons for giving FELA plaintiffs relatively broad venue rights, but never addressed the reasons why venue should be broader against out-of-state defendants than in-state defendants. App. 9a (emphasis added).

[6] The Montana venue statute has remained substantially the same since enacted in 1864, long before the enactment of the FELA in 1908. FELA, 35 Stat. 65 (1908).

[7] The FELA does not discriminate in venue for actions brought in federal court. 45 U.S.C. § 45 (1981). And for FELA actions in state court, this Court has expressly required nondiscrimination in venue rules as between FELA actions and actions under state law. *See Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942) ("By virtue of the Constitution, the courts of the several states must remain open to [FELA] litigants on the same basis that they

That the underlying cases here arise under the FELA does not diminish the constitutional dimensions of the question presented. *The statute's discrimination is not between plaintiffs and defendants, or between railroads and other businesses; it is between domestic and non-resident corporations.* Every case will have its own factual specifics, and the fact that these cases arise under a particular federal statute, with its own substantive objectives, does not obscure the fundamental issue. As set out in the petition, constitutional law has a vital role to play in restraining state legislation which targets non-residents for disadvantageous treatment. *See* Pet. at 18-19 & nn.24-26. The constitutional question presented in this case—equal protection in state court venue—has arisen in a number of other state supreme courts, in many different types of cases, with widely divergent results. *See* Pet at 20-24 & nn.27-36. The issue is worthy of review by this Court, and is crisply presented by this case.

3. The Opposition concedes, sometimes almost exalts, the forum shopping against BN in Montana state court.[8]

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are open to litigants with causes of action springing from a different source.").

The legislative history of the FELA does not support respondents' contentions. Opp. at 8-9. The quotation of Senator Borah refers to the *federal* court venue provisions of the statute. In addition, respondents' invocation of the "Jennings Bill" is pointless. The Jennings bill was not rejected by either house of Congress: the House approved the bill, 93 Cong. Rec. 9193-9194 (July 17, 1947), but the Senate never debated or voted on it. In these circumstances, no inference about "legislative intent" can be drawn.

[8] *See, e.g.*, Opp. at 3 ("the underlying actions *were* brought in a 'selected' Montana state court" (emphasis in the original)); *id.* at 6 ("incontrovertible fact that forum-shopping is *expressly sanctioned* under the FELA" (emphasis in the original)). Contrary to the Opposition, reversal of the decision below would not "forc[e]" FELA plaintiffs to sue "in a 'railroad town.'" Opp. at 9. A FELA action could still be brought in any federal district court where the railroad does business, or in any state court specified by state venue laws of general applicability (for example, where the accident occurred).

Yet respondents also hedge their bets, attempting to rationalize why they and so many other plaintiffs have gone out of their way to bring suit in two selected Montana state courts. For the first time, they claim that the heavy concentration of cases brought in Yellowstone County (Billings) and Cascade County (Great Falls) is due to the location of doctors and medical facilities in those two places. Opp. at 6-7.

On its face, this assertion is simply not credible.[9] Railroad workers from locations as distant as Nebraska and Colorado would not have ignored the medical facilities available in their own and intermediate states in order to obtain medical treatment in a county in a distant part of Montana. Nor is it plausible that many Montana residents with homes closer to Billings would bypass medical facilities available there in order to be treated in Cascade County.[10]

In fact, petitioner has analyzed the last twenty FELA accident cases filed against it in state court in Montana and found no substance in respondents' assertion.[11] Six-

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[9] Under this theory, personal injury plaintiffs make their choice of forum not in order to achieve their maximum tactical advantage, or for the greatest geographical convenience of themselves and their lawyers—but for the convenience of the doctors who serve as attending physicians and expert witnesses.

[10] *See generally* App. 27a-44a (six-year docket summary). Sixteen out-of-state plaintiffs must have traveled *past* Billings to bring suit in Cascade County: Anderson (resident of South Dakota); Belden, E. (Wyoming); Belden, D. (Wyoming); Berumen, W. (Wyoming); Brown (Wyoming); Dickerson (Nebraska); Douglas (Wyoming); Hernandez (Wyoming); Houser (Colorado); Johnson, G. (South Dakota); Johnson, R. (Nebraska); Jolly (Wyoming); Keller (South Dakota); Kobielusz (Wyoming); Meeker (Wyoming); Rieck (Wyoming).

In addition, at least sixteen plaintiffs who reside near or east of Billings passed up Billings to bring suit approximately 100 miles to the west in Cascade County: Amsk, D.; Amsk, M.; Bardon; Blanchette; Bowles; Comer; Hammer; Harms, T.G.; Haug; Hayes; Mitchell; Mogen; Oblizalo; Phillips; Sadowsky; Sikveland.

[11] The most recent twenty cases were used because their medical files were readily available for review.

teen of the twenty cases were filed in Cascade County; in thirteen of these, *not a single doctor* was located in Cascade County.[12] Thus, the role of Cascade County, Montana, in attracting cases from all over a multi-state region, cannot be explained by its asserted medical pre-eminence.

4. Respondents deny the most obvious motive for the prevalence of forum shopping in Montana, stating that "there is no evidence that Yellowstone and Cascade County juries render 'enhanced verdicts' against FELA defendants." Opp. at 7. This assertion runs directly contrary to ordinary expectations and understandings about how personal injury litigation is conducted, and therefore demands a reply. Over the past six years, BN's own experience has been that the average dollar result in a FELA action in Cascade County court—where the majority of such state court cases are filed—is approximately twice that in other Montana state courts.[13] Furthermore, the average dollar result in Cascade County cases is well over twice the corresponding amount for all FELA cases brought against BN.[14]

In the give and take of personal injury litigation, forum shopping at the beginning of a case only opens the door for other forms of bias against an out-of-state corporate defendant. As one state supreme court observed earlier this year, "[i]n any adversarial system where residents are pitted against non-residents, there will inevitably be a temptation to redistribute wealth in the

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[12] In two of the remaining three cases in Cascade County, the plaintiffs and some of their doctors were from Hill County, the county of BN's principal place of business in Montana.

[13] The comparison is based on FELA cases against BN in Montana state court, which were disposed of by verdict or settlement in the years 1986 through 1991. Settlements, of course, are based on the parties' expectations of the likely size of award for a particular jury or jury venire.

[14] This comparison is based on nearly three thousand FELA cases against BN nationwide (in federal and state courts in twenty-four states), which were disposed of by verdict or settlement in the years 1986 through 1991.

direction of residents . . . ." *Blankenship v. General Motors Corp.*, No. 19949, slip op. at 12 n.11 (W. Va. June 27, 1991). The author of that opinion made the point even more directly in his book:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[15]

Judges in Montana, as in West Virginia and almost half of all of the states, are elected. When statewide forum shopping is allowed, plaintiffs are free to select those judges and juries who are by reputation most inclined to grant high monetary awards against out-of-state corporate defendants.[16]

Thus, permitting the plaintiff to have his or her choice of the *most favorable forum in the state* shifts the litigation balance dramatically in the plaintiff's favor. For this reason, the Montana venue statute is profoundly discriminatory, in authorizing wide-open forum shopping against out-of-state corporations while no such latitude is permitted plaintiffs who sue Montana-based corporations.

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[15] Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From State Court Politics* 4 (1988); *see also id.* at 24-25 (incentives facing elected judges); 70-71 (preferences of state courts and juries for in-state versus out-of-state interests). Justice Neely has served on the highest court of West Virginia since 1973, three times as Chief Justice.

[16] As one scholar has observed:

> [A]ny lawyer [knows] that the intangibles of personnel and procedure [can] tip the balance in many a case. . . . American lawyers have long known how to take a defendant with statewide operations to the right county and city; thus do rural complaints against Illinois railroads get filed in Chicago to avoid the stingy juries often found downstate.

Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* 82-83 (1991).

For whatever reason, the Montana legislature has chosen to shield domestic corporations from statewide forum shopping. Therefore, it is unconstitutional for Montana to deny that same protection of laws to out-of-state corporations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and order of the Supreme Court of the State of Montana. In the alternative, the writ should issue and the decision and order below should be summarily reversed on the basis of *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927).

Respectfully submitted,

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